Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

**October Term, 1979**
**No. 79-1295**

McKEESPORT AREA SCHOOL DISTRICT,
*Appellant*

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF EDUCATION,
*Appellee*

*On Appeal From the Commonwealth Court of Pennsylvania.*

## MOTION TO DISMISS OR AFFIRM

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STATUTE:

Act of December 29, 1972, P.L. 1726, No. 372, amended Section 1361 of the Public School Code of 1949, Act of March 10, 1949, P.L. 30, Article XIII, as amended, 24 P.S. Section 13-1361 ..... 6





## MOTION TO DISMISS OR AFFIRM

The Appellee in the above entitled case moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment of the Commonwealth Court of Pennsylvania on the ground that the federal question sought to be reviewed was correctly decided by the court below.

## STATUTE INVOLVED

Pennsylvania's Act 372 of 1972 (Act of December 29, 1972, P.L. 1726, No. 372, amended Section 1361 of the Public School Code of 1949, P.L. 30, Article XIII, as amended, 24 P.S. Section 13-1361) is set out verbatim in Appellant's Jurisdictional Statement at page 4.



## QUESTION INVOLVED

Does Act 372 violate the Establishment Clause of the First Amendment to the United States Constitution as a law respecting the establishment of religion?

## STATEMENT OF THE CASE

The parties in this case are the McKeesport Area School District, Appellant, and the Pennsylvania Department of Education, Appellee. Appellee has a statutory duty to uphold the laws of the Commonwealth relating to public and nonpublic schools.

The Appellant School District, prior to the effective date of Act 372, failed to provide transportation for pupils attending nonpublic schools located outside the district's boundaries. On February 14, 1974, the Department issued a show cause letter to the Appellant School District placing in issue the possible withholding of transportation reimbursement for the 1973-74 school year. On December 23, 1974, the Department issued an amended order to show cause relying on the District's refusal to transport students beyond district boundaries.

An adjudicatory hearing was held during March and April, 1975 before a Hearing Examiner appointed by the Secretary. Briefs were filed by all parties and the Hearing Examiner's report was filed on October 4, 1976. Exceptions were filed by the Appellant. On April 11, 1977, the Acting Secretary of Education filed his final order requiring the Appellant School District to transport all eligible nonpublic school children beyond the school district boundaries in accordance with the ten mile mandated requirement in Act 372.

An appeal was taken by the Appellant to the Commonwealth Court of Pennsylvania, and, on October 25, 1978, the Commonwealth Court affirmed the portion of



the Acting Secretary's final order requiring the transportation of eligible school children beyond district boundaries. The Appellant School District took a further appeal to the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania, on October 22, 1979, denied Appellant's petition for allowance of appeal. The Appellant then filed an application for reconsideration of denial of allowance of appeal with the Supreme Court of Pennsylvania. That application was denied on November 28, 1979.

## MOTION TO DISMISS

### The Case Presents No Substantial Federal Question

This appeal raises the question of the constitutionality of Pennsylvania's "Pupil Transportation" Act (Act of December 29, 1972, No. 372, P.L. 1726, 24 P.S. §13-1361, as amended). This identical issue was previously raised before the Court, and dismissed for want of a substantial federal question. *School District of Pittsburgh v. Pennsylvania Department of Education, et al.,* U.S. , 99 S.Ct. 3091, 61 L.Ed. 2d 869 (1979).

This statute (hereinafter referred to as "Act 372") provides the same transportation benefits to both public and nonpublic school pupils, namely, transportation to and from the schools in which they are enrolled. For purposes of reimbursement by the state, Act 372 establishes a maximum ten mile limitation on the transportation provided by public school districts to pupils enrolled in nonpublic schools. Insofar as the statute provides transportation "to and from school" for all resident pupils, the transportation benefits are the same for public and nonpublic school students alike.

Since the decision in *Everson v. Board of Education of Ewing Township, N. J.,* 330 U.S. 1 (1946), it has been well established that the Supreme Court will only strike down a state statute if it is clearly beyond the state's constitutional power.



Appellant's assertion that the affirmation of the decision below in *Luetkemeyer v. Kaufman,* 419 U.S. 888 (1974), is a decision "not to extend nonpublic school transportation beyond the *Everson* parameters" (Jurisdictional Statement at 9), ignores the fact that the Missouri statute, unlike the Pennsylvania statute, simply did not provide public school transportation.

Similarly, *Americans United for Separation of Church and State v. Benton,* 413 F. Supp. 955 (S.D. Iowa, 1975), is clearly distinguishable on its facts. That case involved a statute which sought to provide transportation to students in contravention of a statutory prohibition against transportation of public school pupils across district boundaries. There is no such statutory prohibition in Pennsylvania. In fact, public school pupils in Pennsylvania may attend schools in other states (Public School Code of 1949, as amended, P.L. 30, 24 P.S. §13-1315) and in other districts (*Id.* at 24 P.S. §13-1313).

The third case cited by Appellant is similarly distinguishable. *Members of the Jamestown Committee v. Schmidt,* 427 F. Supp. 1338 (D.R.I., 1977). Under the Rhode Island school laws, as under the Iowa school laws, public school children could be transported "only within the local school district." As stated above, this is not the situation under the Pennsylvania school laws. Also, in *Schmidt* the District Court pointed with favor to "the requirement announced in *Everson* . . . that benefits be provided in common, substantially equally, without distinctions between children attending sectarian and public schools." *Id.* at 1348. Thus, neither *Benton,* nor *Schmidt,* creates any conflict with this Court's decision in *Everson.*

Finally, Appellant's request that this Court's prior decision in *Everson* be reconsidered would upset the long established Constitutional precedent of "benevolent neutrality," *Walz v. Tax Commission,* 397 U.S. 664 (1979), and overturn the practice of many states to legislate health and safety measures for children and to provide constitutionally permitted state programs such as "[b]us transportation . . supplied in common to all students." *Lemon v. Kurtzman,* 403 U.S. 602, 616 (1971).



## MOTION TO AFFIRM

A previous Pennsylvania statute permitting the transportation of nonpublic school pupils was challenged in this Court in 1967 on Establishment Clause grounds and this Court dismissed the appeal, *Rhoades v. School District of Abington Township,* 389 U.S. 11 (1967), and denied a petition for *certiorari* in the companion case, *Womell v. Matters,* 389 U.S. 46 (1967).

As recently as 1970, this Court discussed and cited with favor its earlier *Everson* case in *Walz.* Even more recently, in 1977, this Court decided another pupil transportation case, had the opportunity to reverse its holding in *Everson* and did not do so. *Wolman v. Walter,* 433 U.S. 229, 97 S.Ct. 2593, 53 L.Ed. 2d 714 (1977). Nevertheless, Appellant is now asking this Court to reverse itself and the law pronounced in the *Everson* case.

Wherefore, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal, or, in the alternative, to affirm the judgment and order entered in the cause by the Commonwealth Court of Pennsylvania.

Respectfully submitted,

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